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Supreme Court, U.S.
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No. 03-1027

IN THE

Supreme Court of the United States

DONALD RUMSFELD,
Petitioner,

v.

JOSE PADILLA AND DONNA R. NEWMAN,
AS NEXT FRIEND OF JOSE PADILLA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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SUPPLEMENTAL BRIEF OF RESPONDENT

DAVID W. DEBRUIN
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Suite 1200
Washington, DC 20005
(202) 639-6000

JENNY S. MARTINEZ
559 Nathan Abbott Way
Stanford, California 94305
(650) 725-2749

DONNA R. NEWMAN
Counsel of Record
121 West 27th Street
Suite 1103
New York, New York 10001
(212) 229-1516

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, New York 10006
(212) 349-0230

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

SUPPLEMENTAL BRIEF OF RESPONDENT

Pursuant to Supreme Court Rule 15.8, respondent submits this supplemental brief to call attention to intervening matter not available at the time of respondent's last filing.

The Government's assertion in this case of a novel and unprecedented Presidential power to imprison Jose Padilla indefinitely without any charges or trial necessarily raises fundamental questions concerning the scope of that authority, including: to whom this power may be applied; what type of conduct would subject an individual to this authority; what proof of that conduct is required and how is it reviewed; and whether there are limits on the duration of the detention. It is meaningless to ask whether the President has "authority" in this case without attempting to define what that authority is. And these questions necessarily must be considered in the context of this actual case, where the Government asks this Court to find authority for the President's continued detention of Mr. Padilla and to reverse the judgment of the Court of Appeals that – after 20 months of imprisonment in a military jail – Padilla either must be charged with a crime, detained as a material witness, or released.

The obvious need for the Court to consider these questions is not affected by the Government's surprise announcement earlier this week, as referenced in its reply brief filed that same day, *see* Reply Br. at 7 n.6, that Padilla suddenly would be allowed highly limited access to counsel. Two points are important.

First, the Government continues to deny that Padilla has any right to consult with the lawyers appointed by the District Court. As the Department of Defense (DoD) press release cited by the Government states: "DoD is allowing Padilla access to counsel as a matter of discretion and military authority. Such access is not required by domestic or international law and

should not be treated as a precedent."[1] Thus, the Government may change its allegedly discretionary decision at any time.

Second, the conditions that the Government seeks to impose on any meeting between counsel and Padilla are so restrictive that such a meeting cannot be viewed in any meaningful sense as an attorney-client meeting. A DoD official will be present during any conversation, and the conversation will be videotaped and monitored by intelligence officials.[2]

For these reasons, the new facts created by the Government and disclosed in its reply brief should have no bearing on this Court's consideration and disposition of the Petition.

Respectfully submitted,

DAVID W. DEBRUIN
JENNER & BLOCK LLP
601 Thirteenth Street, NW
Suite 1200
Washington, DC 20005
(202) 639-6000

DONNA R. NEWMAN
Counsel of Record
121 West 27th Street
Suite 1103
New York, New York 10001
(212) 229-1516

JENNY S. MARTINEZ
559 Nathan Abbott Way
Stanford, California 94305
(650) 725-2749

ANDREW G. PATEL
111 Broadway, 13th Floor
New York, New York 10006
(212) 349-0230

February 13, 2004

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[1] News Release, *Padilla Allowed Access to Lawyers* (Feb. 11, 2004), at http://www.defenselink.mil/releases/2004/nr20040211-0341.html.

[2] *See* Shannon McCaffrey, *Alleged Dirty Bomb Plotter Given Access to Lawyer*, Knight-Ridder Newspapers, Feb. 11, 2004, *at* http://www.realcities.com/mld/krwashington/7931181.htm.